The Reagan administration's antitrust policy, "original intent" and the legislative history of the Sherman Act

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"History is something that never happened, written by a man who wasn't there."

Anonymous.

Introduction

Until the advent of the Reagan Administration there was an general consensus in the courts and in most of academia with regard to the values underlying and the goals of Federal antitrust policy. In *Appalachian Coals, Inc. v. United States*,[1] the Supreme Court summarized the goals of the Sherman Act as being to prevent "undue restraints of interstate commerce," to maintain "appropriate freedom" of interstate commerce and "to afford protection from the subversive or coercive influences of monopolistic behavior." The Court characterized the Act as "a charter of freedom" and noted that the "restrictions the act imposes are not mechanical or artificial."[2] In *Northern Pacific Ry. v. United States*,[3] Justice Black summarized the philosophy underlying the Act as follows:

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1 288 U.S. 344 (1933).

2 288 U.S. at 359-60.

3 356 U.S. 1 (1958).

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition."[4]

Today, there is no general consensus on the question of the legislative goals of antitrust policy;[5] instead there are many conflicting views concerning the goals Congress had in mind when it enacted the Sherman Act. They range across a spectrum from the view that Congress only intended to enact the values advocated after the passage of the basic antitrust laws some years later by neoclassical economic theorizing, to the view that Congress was primarily concerned with outlawing practices which resulted in unfair wealth transfers, to the view that Congress was concerned with fostering a complex of social, economic and political values. There is also the view that Congress really did not know what it was up to when it launched a federal antitrust

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[4] *Id.* at 4.

[5] This article deals primarily with the legislative history of the Sherman Act even though the legislative histories of the Federal Trade Commission and Clayton Acts are much clearer in their statement of noneconomic goals for antitrust policy. It should also be noted that Congressional Antitrust policy has been expressed in a large number of additional statutes, collected in 4 CCH TRADE REG. REP. para. 25,000, *et seq.*, and by the statement of national political policy through actions like the imposing of United States Antitrust policy for political reasons upon Japan as part of the settlement of World War II. Such actions are representative of the continuing political content of antitrust policy. See Schwartz, Justice and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1979). State antitrust laws, many of which predated the Sherman Act and are of relevance to the meaning of the legislative history of the Sherman Act, are also not considered in this article. See, J. Flynn, Federalism and State Antitrust Regulation (1964); May, Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918, 135 U. PA. L. REV. 495 (1987).

policy in 1890, but was responding to a populist outcry against assorted real and imagined abuses of the trusts. Congress, it is suggested, decided to shuffle the entire problem off to the courts with a vague mandate to apply common law prohibitions against restraints of trade and monopolization to cases brought under the statute.

The debate is one of more than historical interest, since it has been rightly observed:

> Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or several? If by several, how is he to decide cases where a conflict arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules.[6]

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[6] R. Bork, The Antitrust Paradox: A Policy At War With Itself 50 (1978) [hereinafter, cited as Bork, *Antitrust Paradox*]. It should be noted that the underlying policy goals will also dictate which "facts" are relevant, what they mean and how they apply in the circumstances. Each step in the process of determining the relevance, meaning and application of the law and the facts requires constant recourse to the underlying normative goals of the law involved and a sensitivity to the shifting nature of the relevance and meaning of the facts. The normative goals underlying the rules found relevant also determine what will and will not be "facts" to begin with. See Lucas, On Not Worshipping Facts, 8 PHIL. Q. 144 (1958). See also, Cohen, Field Theory and Judicial Logic, 59 YALE L. J. 238 (1950).

To the extent that Judge Bork suggests that "deciding the point of the law" is the only normative step in the process, with the remaining steps dictated by the standards and analytic method of neoclassical economic analysis, he understates the difficult and significant process by which one establishes what facts are "facts" relevant to the analysis, what they mean and what the rules mean and how one interacts with the other to determine what "ought" to be the result. The mechanical application of neoclassical price theory is simply a restatement of the simplistic and discredited positivism of the last century which gave rise to decisions ignoring reality like *Lochner v. New York*, 198 U.S. 45 (1905) and decisions ignoring the requirements of legal reasoning like *United States v. Butler*, 297 U.S. 1 (1936). A similar form of excessively deduc-

Should anyone doubt the current legal significance of the issue of the goals of antitrust policy, one need only survey the dramatic change in enforcement policy inaugurated by the Reagan Administration.[7] It has been the Administration's view that "efficiency" as defined by the Chicago School law and economics theorists, a price based theory developed well after the adoption of the major antitrust laws, is or ought to be the sole goal of antitrust policy. Such a first premise radically alters many traditional antitrust rules; rules built on different premises assuming the antitrust laws were meant to foster a broader complex of values than the narrow goals and wholly artificial factual assumptions underlying the "efficiency only" premise. The Administration's policy is based on a moral premise that individual and institutional greed in a world of absolute property and contract rights, without regard for other moral objectives, should be the sole guide for defining what the law of antitrust "ought" to be. And, the policy's factual premise is based on assumptions of perfect competition in a static world which does not exist. It is a curious development, since few who have read the history of the major antitrust laws hold the view that Congress meant to enshrine a policy of exclusive reliance upon neoclassical price theory and its normative assumptions for defining the means and ends of antitrust policy analysis to be applied to the complex reality coming before the courts under the law adopted.

It is generally agreed that a legislative policy meant to be implemented by courts in a divided form of government, with the primary role for policy formulation entrusted to the legislative branch, requires the courts to be faithful to the broad underlying values the legislative branch meant to be implemented when adopting the law. Indeed, the Reagan Administration claims to be committed to the selection of "nonactivist" judges who will

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tive and positivistic reasoning, ignoring reality by an excessive reliance on the neoclassical model and its deductive reasoning process, has begun to infect antitrust litigation. See, *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986); Flynn, An Antitrust Allegory, 38 HASTINGS L. J. 517 (1987).

[7] See generally, Flynn, "Reaganomics" and Antitrust Enforcement: A Jurisprudential Critique, 1983 UTAH L. REV. 269.

stand by "original intent" and leave law making to the legislative branch of government. Such a commitment necessarily focuses on the process by which "original intent" is identified, a controversial process raising difficult issues of interpretation and the scope of legislative and judicial roles in lawmaking. By what process does one determine "original intent"? Is it sufficient to stop with finding current definitions for the words used in the statute? Must one search for the deeper normative values underlying the language used and understand them in light of the circumstances of the time in which they were used? Is there a knowable and coherent underlying policy discoverable from the legislative history of the Sherman Act and how should that policy be applied by judges in the context of the reality of the late twentieth century?

It shall be the purpose of this article to examine the "efficiency only" interpretation of the legislative history of the Sherman Act underlying the radical shift in enforcement policy by the Reagan Administration and the similar claim of others that the Sherman Act's objectives be defined through the lens of current economic analysis. The legislative history foundation for the Administration's justification for limiting antitrust policy to the neoclassical concept of "efficiency" is found in the writings of Judge Bork, a leading proponent of "judicial restraint" and fidelity to "original intent."[8] The Bork interpretation of Con-

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[8] Other advocates of reliance upon neoclassical theorizing to determine the scope and meaning of the antitrust laws pay little attention to the necessity for enforcement officials and judges to implement or at least acknowledge Congressional intent. Other than reliance upon Judge Bork's legislative intent scholarship, the position of Reagan Administration antitrust enforcement officials appears to be one of limiting enforcement policy to the dictates of neoclassical price theory because it is scientific "truth" and beyond rational question. See Flynn, "Reaganomics" and Antitrust Enforcement: A Jurisprudential Critique, 1983 UTAH L. REV. 269; Flynn, The "Is" and "Ought" of Vertical Restraints After *Monsanto Co. v. Spray-Rite Service Corp.*, 71 CORN. L. REV. 1095, 1124-42 (1986). The underlying factual, economic

gress's "original intent" is unique to Judge Bork and is not shared by others who have made a considered study of the legislative history of the antitrust laws. The principal proponent of the alternative reading of the legislative history from the perspective of current economic theory is Professor Lande.[9] Lande reads the legislative history of the antitrust laws through the lens of economic theory concerning wealth distribution. While the legislative history of the Act does indicate a general concern for the distributive effects of a failure to control the conduct of the trusts, the Lande reading of the legislative history identifies one of the consequences Congress recognized would result because of a failure to implement the goals of antitrust policy—not the goals themselves. In both the Bork and Lande readings of the legislative history, a latter-day economic theory is being used to translate the basic values the Congress which adopted the Sherman Act sought to preserve into the narrow and rigid values underlying one brand of current economic theory.

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and philosophical bases of the claim of the model's unchanging scientific truth have been convincingly discredited and are therefore not considered in this article as a legitimate basis for defining the goals of antitrust policy. *See*, Gjerdingen, The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought, 35 BUFFALO L. REV. 871 (1987); Harrison, Egoism, Altruism, and Market Illusions: The Limits of Law and Economics, 33 UCLA L. REV. 1309 (1986); Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 VA. L. REV. 451 (1974); Rowe, The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics, 72 GEO. L. J. 1511 (1984); Rosenberg, If Economics Isn't Science, What Is It?, 14 Phil. Forum 296 (1983); Sen, Rational Fools: A Critique of the Behavioral Foundations of Economic Theory, 6 PHIL. & PUB. AFFAIRS 317 (1977).

[9] Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 HASTINGS L. REV. 65 (1962) [hereinafter cited as Lande, Wealth Transfers].

I. Using economic models to determine the meaning of the legislative history of the Sherman Act

A. Judge Bork's "efficiency only" rewrite

> *"The legislative histories of the various antitrust laws fail to exhibit anything resembling a dominant concern for economic efficiency."*[10]

Judge Bork has repeatedly asserted that the only goal Congress intended for antitrust policy is to maximize "consumer welfare."[11] It is not the concept of "consumer welfare" those words conjure up in the minds of most people, but the narrow, restrictive and highly technical concept of "consumer welfare"

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[10] Hovenkamp, Antitrust Policy After Chicago, 84 MICH. L. REV. 213, 249 (1985).

[11] Bork, Antitrust Paradox at 51: "(1) The only legitimate goal of American antitrust law is the maximization of consumer welfare; therefore, (2) 'Competition,' for purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decision." Bork, Legislative Intent and the Policy of the Sherman Act, 9 J. LAW & ECON. 7 (1966) [hereinafter, cited as Bork, Legislative Intent]: "Congress intended the courts to implement (that is, to take into account in the decision of cases) only that value we would today call consumer welfare. To put it another way, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction. This requires courts to distinguish between agreements or activities that increase wealth through efficiency and those that decrease it through restriction of output."

In a 1985 article, Judge Bork appeared to recognize that Congress intended to implement a broader spectrum of values than the neoclassical concept of consumer welfare in the enforcement of antitrust policy. Bork, The Role of Courts in Applying Economics, 54 ANTITRUST L. J. 21, 24 (1985). However, Judge Bork suggested that for courts to balance "such things as consumer welfare and small business welfare" would be to engage in a "task that is so unconfinedly legislative as to be unconstitutional." *Ibid.* That position was reiterated by Judge Bork in unpublished remarks "Anticipating Antitrust's Centennial" before The Association of the Bar of the City of New York, November 15, 1986. See also, Rothery Storage & Van Lines Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1985). (Opinion of Judge Bork with extensive dicta applying "efficiency only" assumption.)

mechanically deduced from the artificial and abstract factual and moral assumptions of neoclassical economic theorizing. That concept, premised upon abstract assumptions of perfect competition in a static world of instant, equally shared information by tautologically defined "rational maximizers,"[12] is used to sum up the sole goal of antitrust policy as: "the effort to improve

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[12] Reliance on the "rationality" assumption of neoclassical analysis has been extensively criticized elsewhere. See Flynn & Ponsoldt, Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neo-Classical Economic Analysis in the Resolution of Antitrust Disputes, 62 N.Y.U. L. REV. 1125 (1988). For an exhaustive examination of the underlying assumption of "rationality" in light of several disciplines and empirical studies, see Harrison, Egoism, Altruism, and Market Illusions: The Limits of Law and Economics, 33 UCLA L. REV. 1309 (1986). Professor Harrison concludes his extensive analysis of the rationality assumption underlying the "law and economics" movement with the observation: "It has become a particularly virulent form of crabgrass that too many measure by the ground it covers rather than by any real nurturing it provides. Before we abandon the legal field to economics, we had better measure more carefully the fertile thought of other disciplines." *Id.* at 1363.

Judge Bork also uses the concept "rational" in his description of legal reasoning. See notes 6 & 8, *supra*. It is used on the assumption that no reasoning process short of deductive reasoning from fixed rules applied to predetermined facts like those provided by the rigid model of neoclassical theorizing can be "rational." Anything less would give judges unconfined discretion and the power to legislate in violation of the separation of powers. Thus, the argument goes, courts should apply the fixed standard of "consumer welfare" in order to avoid acting unconstitutionally as "legislators."

The fact that the legal process unavoidably confers discretion on decision makers due to the nature of language, facts and legal reasoning does not mean that it is an uncontrolled or irrational form of discretion or that it constitutes a constitutionally proscribed kind of assumption of legislative powers. Bork's assumption otherwise, is the conclusion of an unreconstructed positivist oblivious to modern views on the nature of legal and other forms of reasoning. See, Flynn & Ponsoldt, *supra* note 12; F. Cohen, The Ethical Basis of Legal Criticism (1959); T. Kuhn, The Structure of Scientific Revolutions (2d ed. 1970); Burton, Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules, 91 YALE L. J. 1136 (1982); Dickinson, Legal Rules: Their Function in the Process of Decision, 79 U. PA. L. REV. 833 (1931); Gordley, Legal Reasoning: An Introduction, 72 CALIF. L. REV. 138 (1984); Lehman, Rules In Law, 75 GEO. L. J. 1571 (1984).

allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."[13] The meaning of "consumer welfare," the basic and only value Judge Bork reads into the legislative intent of the antitrust laws, is limited to conduct which is "output restricting" and hence detrimental to allocative and productive efficiency—all within the fixed and artificial factual and normative assumptions of the model.[14]

Everyone who has made a considered study of the legislative history of the major antitrust laws flatly rejects Judge Bork's assertion that "consumer welfare" was the only goal Congress had in mind when it enacted the Sherman Act.[15] Indeed, even a

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[13] Bork, Antitrust Paradox at 91.

[14] For my criticisms of exclusive reliance upon the model, the legislative history of the antitrust laws notwithstanding, see, Flynn, The Misuse of Economic Analysis in Antitrust Litigation, 12 Sw. U. L. Rev. 335 (1981); Flynn, "Reaganomics" and Antitrust Enforcement: A Jurisprudential Critique, 1983 Utah L. Rev. 269; Flynn, The "Is" and "Ought" of Vertical Restraints After *Monsanto v. Spray-Rite Service Corp.*, 71 Cornell L. Rev. 1095 (1986); Flynn, An Antitrust Allegory, 38 Hast. L. J. 517 (1987); Flynn & Ponsoldt, *supra* note 12.

[15] Carstensen, Antitrust Law and the Paradigm of Industrial Organization, 16 U. C. Davis L. Rev. 487 (1983); Fox, The Modernization of Antitrust: A New *Equilibrium*, 66 Cornell L. Rev. 1140 (1981); Fox, The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window, 61 NYU L. Rev. 554 (1986); Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretations Challenged, 34 Hastings L. J. 65 (1982); May, Antitrust Practice in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918, 135 U. Pa. L. Rev. 495 (1987); Million, The Sherman Act and the Balance of Power, as yet unpublished manuscript accepted by the So. Cal. L. Rev. (1988); Orland, The Paradox in Bork's Antitrust *Paradox*, 9 Cardozo L. Rev. 115 (1987); Pitofsky, The Political Content of Antitrust, 127 U. Pa. L. Rev. 1051 (1979); Rowe, The Decline of Antitrust and the Delusion of Models: The Faustian Pact of Law and Economics, 72 Geo. L. J. 1511 (1984); Schwartz, "Justice" and Other Non-Economic Goals of Antitrust, 127 U. Pa. L. Rev. 1076 (1979); M. Sklar, The Sherman Antitrust Act and the Corporate Reconstruction of American Capitalism, 1890-1914, in Corporations and Society: Power and Responsibility 65 (W.

cursory reading of the legislative history reveals the Congress which adopted the Sherman Act had no idea of the technical neoclassical concept of economic efficiency. Scholarship rejecting Judge Bork's reading of the legislative history has been ignored by Judge Bork except to state that to the extent that Congress intended judges to balance a congeries of social, political and economic goals in interpreting the antitrust laws, they have charged the courts with an unconstitutional duty.[16]

Samuels & A. Miller, eds. 1987); Symposium, The Economic, Political and Social Goals of Antitrust Policy, 125 U. PA. L. REV. 1182 (1977). Significant studies of the legislative histories of the antitrust laws made prior to Judge Bork's study in 1966 failed to uncover any evidence which could be interpreted as supporting Judge Bork's neoclassical twist on the intent of Congress. See, W. Letwin, Law and Economic Policy: The Evolution of the Sherman Antitrust Act (1966); H. Thorelli, The Federal Antitrust Policy—Organization of an American Tradition (1954); Limbaugh, Historic Origins of Anti-Trust Legislation, 18 Mo. L. REV. 215 (1953).

[16] Bork, The Role of Courts in Applying Economics, 54 ANTITRUST L. J. 21, 24 (1985): "In any case, courts are not, I believe, entitled to balance such things as consumer welfare against small business welfare without engaging in a task that is so unconfinedly legislative as to be unconstitutional. That is why I think given the way our present antitrust laws are written—they could not be written otherwise—courts must adopt consumer welfare as their sole guide in deciding cases." See also, Bork, Anticipating Antitrust's Centennial, unpublished remarks made before the Association of the Bar of the City of New York, November 15, 1986.

Underlying these statements is the assumption that neoclassical economic theorizing is objective and not value laden and the further assumption that a finding that Congress did intend courts to weigh several values in implementing the antitrust laws would delegate to the courts a legislative function of weighing normative goals in fashioning the rules. The first assumption ignores the fact that the model is premised on a series of hidden normative assumptions and the inevitability of exercising discretion in the process of determining the relevance, meaning and applicability of the hidden normative assumptions to the facts of individual disputes—and, vice-versa. See, Flynn & Ponsoldt, *supra* note 12; Harrison, *supra* note 12; Leff, *supra* note 8. The second assumption ignores the essence of legal reasoning which unavoidably confers some level of discretion on decision makers in view of the function of language, perception, concepts and the complex inductive reasoning process involved. It is a rejection of the basic proposition that

Judge Bork's reading of the legislative history of the antitrust laws is heavily influenced by his underlying belief in both the necessity and possibility of analytical positivism being used in legal reasoning and the scientific objectivity of the neoclassical model being used as the major premise for the exercise.[17]

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every legal decision is unavoidably a moral or "ought" decision. See, F. Cohen, Ethical Systems and Legal Ideals: An Essay on the Foundations of Legal Criticism (1959); Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809 (1935); Flynn & Ponsoldt, *supra* note 12; Pound, The Theory of Judicial Decision, 36 HARV. L. REV. 940 (1936). In describing Judge Bork's commitment to neoclassical economic policy and rejection of the moral responsibility of judges in a common law decision process, Professor Kurland accurately observed: "For Bork, it would seem that the only natural law required to be given effect by the Supreme Court is that of supply and demand, unrestrained by moral considerations, public or private." Kurland, Bork, The Transformation of a Conservative Constitutionalist, 9 CARDOZO L. REV. 127, 131 (1987).

[17] Judge Bork is perhaps the clearest and most persistent exponent of the necessity (value) of courts following a positivistic approach in antitrust analysis, although he does not address the troubling jurisprudential question of whether it is possible. See note 8 *supra*. It is a method of first coming up with a model and then fitting reality into the model, rather than examining the world with an awareness of one's own assumptions and convictions in an attempt to understand the values the lawgiver intended the courts to implement in dealing with the reality allegedly addressed by a particular law. This process is, of course, the reverse of the common law reasoning process and results in the judge imposing his or her own moral views in lieu of those of the lawgiver. Judge Bork arrives at this position because he is a legal positivist who rejects the mainstream understanding of the nature of legal reasoning and the basic proposition that every legal decision is unavoidably a moral decision because of the nature of language, human reasoning and our methods for perceiving reality. It is an invitation to ignore "original intent" and engage in extreme "*judicial activism*" by first constructing a model out of values one believes the law ought to protect and then imposing that model on the investigation of the lawgiver's intent. Judge Bork is quite open in his advocacy of such an approach; a methodology which underlies his approach to legal analysis generally. He has written:

> The need of the law generally is for the systematic development of normative models of judicial behavior, models which, while they cannot attain, will at least distantly approach the

influences in his analysis are not only open to convincing, indeed devastating, jurisprudential attack,[18] but they also explain why his reading of the legislative history of the Sherman Act is so clearly a case of distorting the record to fit his ideological belief of what "ought" to be the goals of the law, rather than an objective attempt to understand the goals motivating Congress.

Judge Bork's original analysis of the legislative history of the Sherman Act and the one he still abides by[19] begins with seven

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> rigor of the descriptive models of basic economic theory. Until we have such models, criticism of the courts for having the wrong goals will generally be empty, the mere assertion of a different set of personal preferences. That is a deplorable condition, since it means that we lack valid, objective standards for evaluating and controlling judicial performance. In such circumstance, we cannot attain a "rule of law."
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> Whether one looks at the texts of the antitrust statutes, the legislative intent behind them, or the requirements of proper judicial behavior, therefore, the case is overwhelming for judicial adherence to the single goal of consumer welfare in the interpretation of the antitrust laws. Only that goal is consistent with congressional intent, and, equally important, only that goal permits courts to behave responsibly and to achieve the virtues appropriate to law.
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> There is no body of knowledge other than conventional price theory that can serve as a guide to the effects of business behavior upon consumer welfare [as defined by the model]. To abandon economic theory is to abandon the possibility of a rational antitrust law.

Bork, Paradox at 72, 89, 117.

In commenting on a similar philosophy of positivism underlying Posner's Economic Analysis of Law, Arthur Leff observed: "all you have ended up doing is substituting for the arbitrariness of ethics the impossibilities of epistemology." Leff, *supra* note 8, at 456.

[18] See articles cited, *supra* note 8.

[19] See Bork, *supra* note 16; Rothery Storage & Van v. Atlas Van Lines, 792 F.2d 210 (D.C. Cir. 1986) (also suggesting that several Supreme Court antitrust opinions have been implicitly overruled by virtue of the logic of his assumptions and those of the neoclassical model).

general observations, each of which he claims indicates the inevitability of the conclusion that Congress intended the neoclassical concept of "consumer welfare" to be the sole goal of antitrust policy. The Bork analysis of the legislative history provides an interesting demonstration of how a strongly held ideology coupled with a rigid belief in legal positivism can cause one to rewrite a legislative history to conform with one's ideology and the subtle process by which the task can be almost convincingly accomplished. What follows is an analysis of Judge Bork's rewrite of the legislative history of the Sherman Act to make that history conform with his ingoing ideology. It is a patently distorted rewrite which has become the premise of the Reagan Administration's antitrust policy—illustrating that the Administration's claim of unyielding fidelity to "original intent" and undying hostility to activist judges who "make law" rather than simply applying the rules dictated by Congress and the Constitution is an example of hypocrisy of the highest order.

GENERALITY I

Bork analysis: The bills introduced and the debates on the Sherman Act indicate that the sole goal of antitrust legislation was the protection of "consumer welfare" (consumer welfare as defined by neoclassical theorizing).[20]

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[20] Bork, Legislative Intent at 11. Part of this assertion is based on the technical and specific neoclassical meaning Judge Bork places on the concept "competition" every time the concept is used in proposed legislation or in debate on the bills by the 50th and 51st Congresses. For example, Judge Bork points to Senator Sherman's original bill, S. 3445, 50th Cong. (1888) and its successor, S. 1 in the 51st Congress of 1890, as consistently declaring illegal two classes of joint activity: (1) those made with a view or which tend "to prevent full and free competition" and (2) those designed or which tend "to advance the cost to the consumer." Bork, Legislative Intent at 7 & 15. The concept "competition" is immediately translated into the straitjacket of the model with the assertion that it is meant to "subject firms to market forces" and is "hardly a means of preserving social values consumers are not willing to pay for." Bork, Legislative Intent at 16. A reading of Senator Sherman's remarks in the context of the social, political and economic views of the day indicates that he was using the concept of "competition" in a broader political sense of competition being a process to which every individual was

Legislative history: Nowhere in the legislative history is there any mention of the neoclassical concept of "consumer welfare," an equating of the concept "competition" with the neoclassical meaning for the concept, or the statement of a belief in preexist-

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entitled in the economic sphere. See his remarks at 20 Cong. Rec. 1167 (50th Cong. 1889); bill adopts the common law; 21 Cong. Rec. 2456 (51st Cong. 1890); deals with "combinations that affect the industrial liberty of citizens," id. at 2457; rights to form combinations in form of corporation should "be open to all upon the same terms and conditions," id. at 2457. "It is the right of every man to work, labor and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundation of the equality of all rights and privileges." 21 Cong. Rec. 2457 (51st Cong. 1890).

One consequence of displacing the competitive process was seen as an adverse long-term impact on the property rights of consumers by raising prices because those displacing the process would have as their only motive to increase their profits. "The law of selfishness, uncontrolled by competition, compels it [unlawful combination] to disregard the interest of the consumer." 21 Cong. Rec. 2457 (51st Cong. 1890). The underlying evil in such circumstances was seen as political by Senator Sherman, not economic in the sense in which neoclassical theorizing defines the problem: "If the concentrated powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government . . . . If anything is wrong, this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity." 21 Cong. Rec. 2457 (51st Cong. 1890); "The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, of opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition." 21 Cong. Rec. 2460 (51st Cong. 1890). See also, 21 Cong. Rec. 4100 (51st Cong. 1890). Remarks of Congressman Mason: "Some may say that the trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to 1 cent a barrel it would not right the wrong done to the people of this country by the "trusts" which have destroyed legitimate competition and driven honest men from legitimate business enterprises."

ing and absolute contract and property rights[21]—the central and unstated normative assumption underlying the model.[22] Indeed, neoclassical theorizing did not arise or become generally known until well after the passage of the basic antitrust laws. The most exhaustive study of that history and contemporary events concluded that Congress ignored economists and vice versa when drafting and adopting the Sherman Act.[23] While Congress was

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21 See, Gjerdingen, The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought, 35 BUFFALO L. REV. 871 (1986). The model assumes the existence of a legal system and defined property and contract rights. It is circular, of course, to use the model to define the legal meaning and scope of those rights while assuming the rights to be defined are preordained and immutable. It is assumed that the problem is avoided by assuming preexisting and inherent rights of property and contract, a controversial political and normative assumption generating debate for at least the last three centuries.

22 It is evident that Judge Bork imposed the neoclassical meaning of the concept of "competition" upon the use of that concept wherever it appeared in the debate over the Sherman Act and in the debates over the other major antitrust laws. See, e.g., Bork, Antitrust Paradox at 61, equating use of the word "competition" in the Clayton Act with the neoclassical meaning for the concept and equating the neoclassical concept with "everyday speech"; *id.* equating Congressional concerns with protection of consumers with the neoclassical concept of "consumer welfare"; *id.* at 63, equating Congressional purpose in passing Clayton Act and F.T.C. Act with neoclassical concept of "consumer welfare."

23 See H.B. Thorelli, *The Federal Antitrust Policy* 226, 311-29 (1955). There were of course economic, political and social beliefs generally subscribed to by the members of Congress, as well as the population generally. At any one time in the evolution of a culture there are central, core beliefs which are generally not questioned since they are fundamental to a society, what it is and what it aspires to be. Those beliefs also define rules and roles, like those of the judiciary and the legislature within the society so that only peripheral issues arise concerning the scope and meaning of rules and roles. Thus, the fact that there was little or no dialogue between Congress and the economists of the day in the drafting of the Sherman Act does not mean that widely held economic, political and social beliefs were ignored. They were simply beliefs beyond question; beliefs so pervasively held that no one saw a need to debate them. See May, Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1180-1918, 135 U. PA. L. REV. 495 (1987). There appears to have been a general consensus in the debate over the Sherman Act that

concerned with preserving the efficiencies (productive, allocative, inventive, wealth distribution, etc.) of combinations of capital and labor, that concern was understood in a far more general sense than the narrow price-based and technical meaning given the concept of "efficiency" by the neoclassical model. Efficiencies inherent in the corporate form and those attributable to individual imagination and effort were to be balanced with several other values and in light of the reality of particular disputes coming before the courts. There is no indication that judges were expected to decide the reality of particular disputes by first positing an abstract, static and artificial model of reality (a model not then in existence), derive fixed rules from the model, and then apply those unrealistic rules to a predetermined reality solely for the purpose of preventing "reductions in output." Instead, Congress expected judges to apply common law rules and common law legal reasoning to the reality arising under the antitrust laws and to decide cases in accord with the general

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"trusts" were unnatural, artificial creations resulting in a denial of equal opportunity to individuals in the economic sphere, in unfair or unjust wealth transfers from consumers to owners of the trusts, and in the creation of undue political power and the undermining of the competitive process. See note 20, *supra*. Underlying these generalities was the normative value of using governmental power to define and limit the scope of private property and contract rights, particularly in the hands of corporations and trusts, for the purpose of protecting every individual's right to succeed or fail by virtue of a competitive process. Although many judges were under the sway of a simplistic version of *laissez faire* ideology at the time of the Act's adoption, Congress and state legislatures were not. See, A. Soifer, The Paradox of Paternalism and Laissez-Faire Constitutionalism, 1888-1921, in Corporations and Society: Power & Responsibility 161 (W. Samuels & A. Miller, eds. 1987); Benedict, Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism, 3 LAW & HIST. REV. 293 (1985). Of necessity, courts were viewed as having the function of weighing specific cases in light of the general normative values Congress had in mind because of the complexity of the reality being dealt with and the constitution-like level of generality upon which the legislation was drafted. See 21 Cong. Rec. 2456 (51st Cong. 1890) (remarks of Senator Sherman); 21 Cong. Rec. 2643 (51st Cong. 1890) (remarks of Senator Reagan); 21 Cong. Rec. 2726 (51st Cong. 1890) (remarks of Senator Edmunds); 21 Cong. Rec. 4102 (51st Cong. 1890) (remarks of Congressman Fithian).

values Congress sought to achieve in light of the particular reality of the cases arising under the law.[24]

GENERALITY 2

Bork analysis: The rules of law which Congress foresaw are inconsistent with any other premise than a consumer welfare goal only for the Sherman Act: namely, rules prohibiting cartel agreements, monopolistic mergers and predatory business practices.[25]

Legislative history: The particular rules selected by Judge Bork from the many foreseen in the legislative history are not inconsistent with the other values (i.e., prohibition on unfair wealth transfers, guaranteeing equality of market access to all by preserving competition as a process, restricting monopolistic mergers and curbing the political power of concentrated industries) of central concern to the Congress which adopted the Sherman Act and those Congresses which adopted subsequent antitrust laws.[26] Moreover, many of the other "rules of law which Congress foresaw" are inconsistent with the narrow and technical neoclassical concept of "consumer welfare." For example, a rule of law prohibiting coercion in forcing an individual to give up a business without regard for neoclassical "efficiency" concerns;[27] rules prohibiting undue wealth transfers from consumers to sellers;[28] an

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[24] 20 Cong. Rec. 1457-58 (50th Cong. 1889) (remarks of Senator Jones); 21 Cong. Rec. 2456-62 (51st Cong. 1890) (remarks of Senator Sherman); 21 Cong. Rec. 2568-70 (51st Cong. 1890) (remarks of Senator Sherman); 21 Cong. Rec. 2726-28 (51st Cong. 1890) (remarks of Senator Edmunds); 21 Cong. Rec. 4088-92 (51st Cong. 1890) (remarks of Congressman Culbertson, House manager of the bill); 21 Cong. Rec. 4100 (51st Cong. 1890) (remarks of Congressman Mason); 21 Cong. Rec. 4102-04 (51st Cong. 1890) (remarks of Congressman Fithian).

[25] Bork, Legislative Intent at 11.

[26] It should be noted that Congress has adopted many more "antitrust laws" than just the Sherman, Clayton and F.T.C. Acts. See note 5, *supra*.

[27] 20 Cong. Rec. 1167 (50th Cong. 1889) (colloquy between Senators Salisbury and Hoar).

[28] 20 Cong. Rec. 1457 (50th Cong. 1889) (remarks of Senator Jones, 21 Cong. Rec. 2457, remarks of Senator Sherman); 21 Cong. Rec. 2646 (51st Cong. 1890) (remarks of Senator Reagan).

intention to adopt common law prohibitions on restraints of trade;[29] and, the explicit mention of a specific intent to include a

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[29] 21 Cong. Rec. 2457 (51st Cong. 1890) (remarks of Senator Sherman). Precisely what was meant by the expression of this intention beyond delegating to federal courts the authority to review the "reasonableness" of a restraint pursuant to a common law analytical process is unclear. See, Dewey, The Common Law Background of Antitrust Policy, 41 VIRGINIA L. REV. 759 (1955). Justice Taft's opinion in United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898) saw the meaning of adopting common law prohibitions into a federal statute as: 1) Creating a federal crime and damage action for contracts which were void and unenforceable at common law; 2) Limiting the right of contract by private parties where the restraint disabled a party from earning a livelihood, deprived the community of the services of the individual excluded or where the restraint tended to give the beneficiary of the restraint a monopoly in the sense of excluding a competitor from trade; 3) Preventing enhancement of prices and engrossing of the market; 4) Curbing agreements discouraging industry and enterprise and diminishing the products of ingenuity and skill; and 5) Vesting in federal courts the power to balance the "ancillary" and "nonancillary" objectives of the restraint and to determine whether it is the objective of the parties to directly restrain trade or to achieve a lawful objective in a reasonable manner. See also, Standard Oil Co. (N.J.) v. United States, 221 U.S. 1, 50-63 (1911).

The federalizing of the common law and its processes in dealing with restraints of trade was a part of legitimizing a capitalist regime in the newly emerging form of corporations and trusts. Congress did so by subjecting that regime to constraints of a competitive process umpired by the federal courts at the instance of the Executive branch and private parties enforcing the antitrust laws. See, M. Sklar, "The Sherman Antitrust Act and the Corporate Reconstruction of American Capitalism, 1890-1914," in Corporations and Society: Power and Responsibility 65 (W. Samuels & A. Miller, eds. 1987). In implementing this role, the federal courts were necessarily placed in the position of having to define the legitimate scope of private contract and property rights vis-à-vis those of others and the public, in light of the social, political and economic goals Congress had in mind for the antitrust laws. It is in this sense that the Sherman Act should be viewed as a private law defining the scope of contract and property rights and not as a public law. See, Flynn & Ponsoldt, *supra* note 12. It is clear that there was no intent to delegate the definition of those rights to those imposing a restraint pursuant to an abstract model and its technical concept of "consumer welfare," a model not in existence at the time of the adoption of the statute or the development of the common law.

rule prohibiting vertical price fixing by the House manager of the bill.[30]

GENERALITY 3

Bork analysis: Congress was very concerned that the law should not interfere with business "efficiency." Changing the prohibition on monopolies from one of banning "monopoly" to the banning of "monopolization" is a strong indication of a Congressional preoccupation with "efficiency."[31]

Legislative history: There is no analysis of business "efficiency" as that concept is narrowly and technically defined by neoclassical theorizing in the legislative history generally or in the particular debate over the definition of unlawful monopolization. There are numerous remarks made with regard to not outlawing the right to combine to form partnerships or corporations and remarks supporting the combination of capital where the nature of the business so required—a use of the far broader, more generally popular meaning of "efficiency" than the narrow, artificial meaning of allocative and productive efficiency used by neoclassical theorists.[32] The word "monopolize" was expressly defined in the House debates without reference to the as yet undiscovered and narrow meaning of the concept proffered by neoclassical theorizing to mean "to engross, to obtain by any means exclusive rights of trade to any place or within any country

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30 21 Cong. Rec. 4089-90 (51st Cong. 1890) (remarks of Congressman Culbertson). See also, 21 Cong. Rec. 5953-56 (51st Cong. 1890) (remarks of Congressman Morse opposing the bill because it would ban vertical price fixing; citing the Court's opinion in Folwe v. Park, 131 U.S. 88 (1889) (upholding vertically imposed territorial divisions for resale of trade secret product and claiming the interpretation that the Act bans vertical price fixing was inconsistent with such decisions).

31 Bork, Legislative Intent at 12.

32 21 Cong. Rec. 2457 (51st Cong. 1890) (remarks of Senator Sherman); 21 Cong. Rec. 2605 (51st Cong. 1890) (remarks of Senator Stewart in opposition to the bill because it could be interpreted as banning the formation of partnerships and corporations); 21 Cong. Rec. 4094 (51st Cong. 1890) (rejection of proposal by Congressman Wilson, opponent of the bill advocating a policy of no tariffs and reliance upon *laissez faire* in lieu of the bill).

(*Footnote continued on following page*)

or district, as to monopolize trade."[33] In the Senate debate, where the prohibition on monopoly was changed to one of prohibiting "monopolization," the Senate did so in order to avoid punishing individual effort and skill resulting in an individual gaining all the business, and not to immunize conduct where such conduct precluded others from engaging in trade or business, even though the conduct might be "efficient" under the dictates of the model.[34]

Judge Bork's criticism of Judge Hand's reading of the legislative history of the Act concerning the monopolization offense in *United States v. Aluminum Co. of America*[35] is particularly curious. Judge Hand saw goals broader than purely economic ones in the legislative history and administration of the Act,[36] and

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(*Footnote continued from previous page*)

The original prohibition of "monopoly" was changed in the final bill to a prohibition on "monopolization." In the Senate debate on the issue of whether to limit the offense to combinations and conspiracies to monopolize and exclude unilateral monopolization, Senator Hoar defined the concept of monopolization as "the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him." 21 Cong. Rec. 3152 (51st Cong. 1890). In words remarkably similar to those of Judge Hand in the *Alcoa* case, language disparaged by Judge Bork in his analysis of the intent of the Act, Senator Hoar stated: "I suppose, therefore, . . . that a man who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business." *Id.* Bork's assertion that the debate reflected an intent to not hinder growth by "efficiency in any way" (Bork, Legislative Intent at 29, footnote 68) is at best an inaccurate distortion.

33 21 Cong. Rec. 4090 (51st Cong. 1890) (remarks of House manager of the bill, Rep. Culbertson).

34 21 Cong. Rec. 3151-52 (51st Cong. 1890) (colloquy between Senators Kenna, Edmunds, Gray and Hoar).

35 148 F.2d 416 (2d Cir. 1945). See Bork, Legislative Intent at 8-9; Bork, Antitrust Paradox at 51-52).

36 148 F.2d at 427.

recognized that the scope of the monopolization offense was meant to bar something more than the possession of a monopoly for reasons broader that just economic ones. The prohibition was changed in the Senate debates from one outlawing "monopoly" to one outlawing "monopolization" with the expectancy that:

> [T]he courts of the United States would say . . . that a man who merely by superior skill and intelligence . . . got the whole business because nobody else could do it as well as he could was not a monopolist, but that it involved something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons engaged in the same business.[37]

No mention was made of prohibiting monopolization because it would reduce output or permitting it where it would not or would produce "efficiencies"; the prohibition was aimed, as Judge Hand recognized, at conduct keeping others from engaging in competition without regard for whether output was reduced or not by the conduct denying them equal opportunity to compete.

GENERALITY 4

Bork analysis: By expressing great concern for labor and agricultural combinations, yet failing expressly to exempt them from the Act, Congress was expressing an intent to preclude the courts from weighing values other than "consumer welfare" in interpreting the Act.[38]

Legislative history: This argument by Judge Bork is confused and confusing, since it seems to suggest that one can derive an affirmative intent to preclude the courts from considering values other than consumer welfare by reason of the failure to exempt labor and farm organizations from the bill; combinations for which many in Congress expressed social and political concerns. Such a convoluted stretching of the record would surely amaze the members of the Congress which adopted the bill. The reason labor and agricultural organizations were not expressly exempted is that Senator Sherman and others believed that "nonbusiness"

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[37] 21 Cong. Rec. 3152 (51st Cong. 1890) (remarks of Senator Hoar).

[38] Bork, Legislative Intent at 12-13.

combinations of laborers and farmers formed "purely for defensive purposes" against business trusts were not intended to be covered by the bill. They were viewed as among the social, political and economic (via unfair wealth transfers and the denial of equality of economic opportunity) victims of monopolistic business interests and beneficiaries of a law securing to them the benefits of a competitive process for social, political and economic reasons.[39]

GENERALITY 5

Bork analysis: Given the narrow view of the commerce power at the time the Act was adopted, it is doubtful Congress intended to give courts the power to make broad social and political decisions. The ends of legislation under the commerce power were generally thought to be "commercial" in nature.[40]

Legislative history: The debate over the scope of the commerce clause was focused on the means by which Congress could regulate, not the ends for which it could regulate. The debate is replete with statements of the political, social and economic objectives of the legislation.[41] Also, analogies to the constitution-

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[39] 20 Cong. Rec. 1458 (50th Cong. 1889) (remarks of Senator Sherman); 21 Cong. Rec. 2562 (51st Cong. 1890) (remarks of Senator Sherman) ("They are not business combinations"); 21 Cong. Rec. 2606 (51st Cong. 1890) (remarks of Senator George in opposition to the bill in the name of *laissez faire* and efficiency); 21 Cong. Rec. 2726-2731 (51st Cong. 1890) (debate between Senators George, Hoar, Platt and Edmunds over whether the bill applies to labor and agricultural organizations). (Concern was the constitutionality over drawing a distinction between industrial and agricultural-labor organizations, not one of universally promoting economic "efficiency.")

[40] Bork, Legislative Intent at 13.

[41] 20 Cong. Rec. 1457 (50th Cong. 1889) (remarks of Senator Jones; necessary for Federal Government to control trusts in order to prevent undue wealth transfers); 21 Cong. Rec. 2456-58 (51st Cong. 1890) (remarks of Senator Sherman; Act is designed to regulate interstate and foreign commerce in order to protect the "industrial liberty" of citizens of the United States; "It is the right of every man to work, labor and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances"); 21 Cong. Rec. 2461-62 (51st Cong. 1890) (remarks of Senator Sherman;

ality of legislation enacted for moral ends like transporting liquor to states prohibiting its sale in order to protect the moral judgment of the state seeking to ban liquor sales were relied upon to support the propriety of relying on the Commerce power in enacting the law for social and political goals.[42]

GENERALITY 6

Bork analysis: Congress recognized that broad discretion was being granted to the courts, "but not one speaker suggested that discretion included the power to consider any values other than consumer welfare."[43]

Legislative history: This statement is impossible to reconcile with the legislative history of the Act. The debate is replete with expressions of an intent to prevent unjust wealth transfers,[44] to secure social values,[45] to curb the political power of trusts,[46] to secure equality of opportunity for every person seeking to engage in trade,[47] and to preclude coercion in excluding persons from business or forcing them by contract to resell at prices dictated by suppliers without regard for "efficiency" as defined by the ideology underlying neoclassical economic theorizing.[48] Nowhere

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prohibit wealth transfers by conspiracies involving interstate commerce within power of Congress); 21 Cong. Rec. 4102-04 (51st Cong. 1890) (remarks of Congressman Fithian). See also, 21 Cong. Rec. 2605 (51st Cong. 1890) (remarks of Senator Stewart in opposition to the bill on *laissez faire* grounds and arguing ends of the bill are to interfere with functioning of the classical concept of the natural processes of the market).

42 21 Cong. Rec. 5952 (51st Cong. 1890) (remarks of Congressman Bland).

43 Bork, Legislative Intent at 13.

44 *Supra* notes 20 & 27. See also, Lande, *supra* note 9.

45 *Supra* notes 38, 40 & 41.

46 *Supra* note 19.

47 *Ibid.*

48 *Supra* note 29.

is there mention of the then unknown neoclassical concept of "consumer welfare."[49] Underlying the debate was the common assumption that the trusts were artificial creations posing great social, political and economic risks to individual competitive opportunity,[50] to consumers and to the political and social systems of the nation. Congress concluded that there was a need to establish federal standards for defining the scope of property and contract rights for interstate trade and commerce in order to confront the evolution of a rapidly changing economic landscape threatening individual economic opportunity.

GENERALITY 7

Bork analysis: The complete absence of any values which conflict with "consumer welfare" by advocates of the Act is "itself compelling evidence that no such values were intended."[51]

Legislative history: This statement is also impossible to reconcile with the legislative history of the Sherman Act. Once again, Judge Bork's invocation of the technical and artificial meaning of "consumer welfare" is being used to define what in fact members of Congress said and meant when they invoked the broader, more general concept of "competition" and the welfare of consumers.[52] The entire debate is replete with expressions of: repeated condemnations of unfair wealth transfers from consumers to producers without regard for the technical concern for what neoclassical theorists call "efficiency"; a central objective of guaranteeing that every person's effort would succeed or fail on the competitive merits; a major concern for curbing the

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49 See Hovenkamp, *supra* note 10.

50 See May, *supra* note 5; Million, The Sherman Act and the Balance of Power, _____ So. Cal. L. Rev. _____ (1988).

51 Bork, Legislative Intent at 13.

52 May, *supra* note 5 at 590: "In addressing the history of early antitrust jurisprudence, . . . [Judge Bork] seem[s] to view the world through historical lenses able to detect the presence of theory only if it corresponds to a theory . . . [he] find[s] sound. Aspects of the historical record not so corresponding apparently come to be relegated to the historical dustbin of mere unsystematic political or personal rambling."

political power of the economically powerful; and the expression of values like guaranteeing success or failure on the merits of individual effort and decision making (protecting competition as a process) by banning practices like vertical price fixing. The arguments of those opposing the bill and advocating a *laissez faire* approach coupled with abolishing tariffs were consistently rejected in the name of the need to secure a broader range of social, political and economic goals than simply relying on the benevolent outcome of a policy of *laissez faire*.

Judge Bork's analysis of the legislative history of the Sherman Act proceeds into an examination of "explicit policy statements," statements which he has selected from the record while ignoring or dismissing others, and statements upon which he imposes his ideological meaning for the words used on the far more general, complex meanings of the words used by the members of the Congress which adopted the Act. He begins by quoting the language Senator Sherman used in his draft bill of 1890, S. 1, reported by the Senate Finance Committee.[53] The bill prohibited agreements, combinations and contracts made with a view, or which tend *to prevent full and fair competition* and those *designed, or which tend to advance the cost to the consumer*. Rather than inquire what Senator Sherman and the Committee meant by "full and fair competition" and "advance the cost to the consumer,"[54] Judge Bork concluded that "it is hardly a means of preserving social values that consumers are not willing to pay for." The mental sleight of hand going on is to substitute the tautological neoclassical concept of "rationality" for Senator Sherman's objectives for insisting on "full and fair competition" rather than to examine Senator Sherman's statement in context to determine the meaning of the terms used. Senator Sherman's

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[53] Bork, Legislative Intent at 15.

[54] On the face of the bill, two independent standards were being proposed for measuring the legality of conduct. The preservation of "full and fair competition" was independent from "advance the cost to the consumer." Under normal rules of construction, the intent to guarantee full and fair competition may well include preserving social and political values even though such a policy might result in short term economic costs to consumers.

meaning for "competition" was to guarantee every person in trade equality of opportunity (competition as a process). Judge Bork also leaped to the conclusion that the term "advance the cost to the consumer" meant what his ideology dictated—the neoclassical meaning of "consumer welfare" or that "consumer welfare" must be measured in terms of what producers believe to be best pursuant to the model of a static, perfectly competitive market where price is determined by atomistic competition and fully informed rational maximizers. "Consumer welfare" in this sense and in the context of reality is a paternalistic concept premised upon a belief in preexisting and absolute property and contract rights and the presumed "rationality" of producers and sellers, rather than consumer welfare in the sense of unfair wealth transfers caused by a breakdown in the competitive process and the denial to every individual of equality of opportunity in access to and fairness in the operations of the market.

Senator Sherman's speech accompanying his report of the bill from the Finance Committee[55] clearly indicates that Senator Sherman had no idea of the then undiscovered neoclassical meaning of competition or "consumer welfare" nor respect for the assumption of preexisting and absolute contract and property rights which underlies the neoclassical model. Instead, Senator Sherman's meaning for "full and fair competition" and "advance the cost to the consumer" included: to give the courts the means for dealing with "the industrial liberty" of the people; to guarantee "the right of every man to work, labor and produce in any lawful vocation and to transport his productions on equal terms and conditions and under like circumstances"; "this bill does not seek to cripple combinations of capital and labor, the formation of partnerships or of corporations, but only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer"; the bill's aims to curb the "law of selfishness, uncontrolled by competition"; to control the "kingly prerogative, inconsistent with our form of government," of concentrated economic power; to curb coerced refusals

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55 21 Cong. Rec. 2156-58 (51st Cong. 1890).

to deal without regard for whether they were "efficient" or not; and to protect the political power of government by precluding the wielding of undue political power by those possessing economic power denying the competitive process to others.

Many of these values were expressly referred to by Judge Hand in *United States v. Aluminum Co. of America*[56] and in *United States v. Associated Press*,[57] opinions Judge Bork characterized in his study of the legislative history of the Act as the "judicial equivalent of free verse or 'tennis with the net down.' "[58] Aside from disparaging the intellectual qualities of one of the great judges of this century, Judge Bork's characterization of Judge Hand's accurate, objective analysis of the legislative history of the Sherman Act is clearly that of an ideologue imposing his view of what the legislative history ought to be, rather than a reflective attempt like that of Judge Hand to determine what the Congress intended and to implement the values identified in the context of the reality before the court. Only by ignoring the words used and the historical context in which they were used, by substituting one's own formula for the debate which took place, and by ignoring the inductive nature of legal reasoning and disregarding the facts of the case, can one criticize Judge Hand's reading of the legislative history of the Sherman Act in the *Alcoa* case.[59]

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56 148 F.2d 416, 428 (2d Cir. 1945).

57 52 F. Supp. 362, 370 (D.N.Y. 1943).

58 Bork, Legislative Intent at 10. Judge Bork's contempt for Judge Hand's *Alcoa* decision has only intensified over the years. In Antitrust Paradox at 170, Bork characterized Judge Hand's *Alcoa* opinion as "a thoroughly perverse judicial tour de force contrary to . . . the entire spirit of antitrust."

59 Judge Bork's characterization of Judge Hand's analysis as "free verse" or "tennis with the net down" is an illustration of his underlying belief that "rational" analysis can only follow the dictates of a rigid form of deductive reasoning. It is this underlying commitment to rigid positivism as the only permissible form of legal reasoning that seems to drive Bork to a mechanistic application of the neoclassical model to the

Judge Bork's study also takes isolated statements and places a neoclassical ideological twist on them in an attempt to justify his "consumer welfare" only value for antitrust policy. For example, Judge Bork quotes Senator Sherman's proposition that the sole touchstone for illegality is raising prices to consumers: "If they (trusts) conducted their business lawfully, without any combinations to raise the price of an article consumed by the people of the United States, I would say let them pursue that business."[60] That quote is followed immediately (in the Congressional debate but not in Judge Bork's article) by an example of conduct Senator Sherman considered unlawful and a displacement of "competition"; an example vesting in a competitor a right to sue under the proposed Act without regard for whether prices were raised to consumers and an example rejecting the simple-minded cliche[61] that the antitrust laws protect competition, not competitors:

> I am not opposed to combinations in and of themselves; I do not care how much men combine for proper objects; but when they combine with a purpose to prevent competition, so that if a humble man starts a business in opposition to them, solitary and alone, in Ohio or anywhere else, they will crowd him down and will sell their

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legislative histories of the antitrust laws and to an insistence that it is the only possible methodology for making antitrust policy rational. The need to satisfy the logical demands of rigid positivism also appears to drive Bork to a high level of distortion of the legislative histories of the antitrust laws in order to make those histories equate with the demands of the first premises of the model. Judge Bork concedes that if this were not the case, and if the underlying Congressional goals of antitrust policy were found to be multivalued, it would require the courts to strike down the antitrust laws because it would require courts to engage in "a task that is so unconfinedly legislative as to be unconstitutional." Bork, The Role of Courts in Applying Economics, 54 ANTITRUST L. J. 21, 24 (1985). Thus a reactionary, simplistic philosophy of law and legal reasoning is coupled with a reactionary, antiempirical form of economic analysis to produce a rigid ideological formula for repealing the antitrust laws by judicial fiat.

60 21 Cong. Rec. 2569, quoted at 9 J. L. & Econ. at 16.

61 For a criticism of the excessive use of cliches in antitrust analysis, see Flynn, The "Is" and "Ought" of Vertical Restraints After Monsanto Co. v. Spray-Rite Service Corp., 71 CORN. L. REV. 1095, 1144, n. 234 (1986).

> product at a loss or give it away in order to prevent competition, and when that is established by evidence that cannot be questioned, then it is the duty of the courts to intervene and prevent it by injunction and by the ordinary remedial rights afforded by the courts.[62]

It should be apparent to all but the committed ideologue that Senator Sherman was concerned with the rights of a competitor unfairly excluded from business without regard for whether prices to consumers were raised or lowered. The conclusion that Senator Sherman's statement describing what was "unlawful" was intended to cover far more than the narrow goals attributed to antitrust policy by neoclassical theorizing is inescapable. In Senator Sherman's view, if a competitor were excluded from business by the means he described, it would matter not whether neoclassical efficiency were served or output was limited. Exclusion of a competitor by means which displaced the right of the ousted competitor to succeed or fail on the merits of a competitive process would itself violate the law.

Other examples of distorting the debates to fit the assumptions and limitations of the model abound. Judge Bork attributes a "consumer welfare" only purpose to other members of the Senate Judiciary Committee, draftsmen of the final version of the Sherman Act. Senator Gray of Delaware it is claimed was a "consumer welfare" only advocate[63] because he introduced an amendment using the same language as Senator Sherman's original bill; viz., prohibiting agreements which "prevent full and free competition" or "advancing the cost of any article to consumers."[64] Once again the meaning of these terms is what is at issue rather than simply equating them with the technical meaning for them established by and understood in terms of the geometry of the neoclassical model. Senator Gray's amendment was expressly designed to achieve the same broad goals that Senator Sherman sought to achieve and to strengthen the bill's remedies by providing for contractual voidness as a remedy in

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62 21 Cong. Rec. 2569 (51st Cong. 1890) (remarks of Senator Sherman).

63 Bork, Legislative Intent at 18-19.

64 21 Cong. Rec. 2657 (51st Cong. 1890).

any suit by interests found to be violating the Act without any mention of the "efficiency" of the contract sought to be enforced. Nowhere did Senator Gray suggest that he was seeking to advance as the sole goal of antitrust policy the dictates of an abstract neoclassical economic model not yet invented or the normative assumptions underlying such an ideology. It is clear that Senator Gray was willing to bar the enforcement of any contract by one violating the goals of the Act without regard for whether the contract itself violated law, let alone was an expression of "efficiency" or not.

One of the major proponents of the Act in the House, Representative Heard of Missouri, is quoted at length by Judge Bork in what he claims is the clearest statement of the "consumer welfare" only value.[65] Congressman Heard was primarily concerned with unjust wealth transfers because of the political, social and economic risks they posed to society and not because a particular practice causing undue wealth transfers indicated the practice defeated economic "efficiency" as defined by the neoclassical model. He saw as a basic purpose of the bill "to crush out those unholy and defiant combinations which for the enrichment of the few persons have made paupers of millions of honest and helpless people."[66] Converting the consequence of unfair

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[65] Bork, Legislative Intent at 19.

[66] 21 Cong. Rec. 4101 (51st Cong. 1890). Congressman Heard's remarks do contain one of the few statements which could be interpreted as consistent with the analytical superstructure of neoclassical theorizing. In referring to the destruction of agricultural interests by the "dressed beef combine," he described it as a "giant robber combination" and "only one of many which by their methods extort millions from citizens of this Republic without adding one cent of value to our production or one iota of increase to our prosperity. In fact, the very object of these giant schemes of combined capital is not to increase the volume of supply, and thus lessen the cost of any useful commodity, but rather to repress, reduce, and control the volume of every article that they touch, so that the cost to consumers is increased while the expenditure for production is lessened." *Id.* While the analysis is similar to the "restrict output" only litmus test for illegality advocated by Bork, it is clear that Congressman Heard's description is a description of one of

wealth transfers injuring competitors, consumers and the body politic into the ends by which wealth transfers were determined to be unfair is not only circular, but it is also a sleight of hand Congressman Heard would undoubtedly not have appreciated.

One could go on with instances of Judge Bork's manipulating the legislative history of the antitrust laws to accord with his ideology of what the law ought to mean rather than his undertaking a reflective, open-minded search for normative values the draftsmen of the basic antitrust laws intended be achieved in the judicial administration of the Act. Suffice it to say, "the legislative histories of the various antitrust laws fail to exhibit anything resembling a dominant concern for economic efficiency."[67] Congress intended that the courts implement and reconcile a complex of goals in order to further underlying values of guaranteeing individual equality of opportunity in economic life; protecting individualism and the political process from the political sway of economic power; preventing an undue misallocation of wealth in society and balancing the contract and property rights of competitors, distributors and consumers in circumstances where the rights of one impacted on the rights of others by insisting that

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the *consequences* of illegal combinations, not the normative values he believed the law ought to preserve. Those values were: social: "crush out those unholy and defiant combinations which for the enrichment of a few persons have made paupers of millions of honest and helpless people" and "these illegal conspiracies against honest trade have stolen untold millions from the people," *id.*; political: "strike hard the blow aimed at the existence of these arrogant oppressors of all our people," *id.*; and, social: "stay this wholesale destruction of that great agricultural section," *id.* Not only were Congressman Heard's remarks devoid of a condemnation of trusts solely for the objective of achieving economic "efficiency" and no more, but his remarks are bracketed by remarks by Congressman Mason expressly rejecting an "efficiency" only goal for the law, 21 Cong. Rec. 4100 (51st Cong. 1890) and remarks by Congressman Fithian, 21 Cong. Rec. 4102 (51st Cong. 1890), condemning trusts for a variety of social, political and economic reasons. Congressman Heard did not dissent from either of these speeches.

[67] Hovenkamp, Antitrust Policy After Chicago, 84 MICH. L. REV. 213, 249 (1985).

all be protected under a regime of fairness and a competitive process.[68]

B. The undue wealth transfer only rewrite

"[T]ruth on earth is a matter of degree and . . . whatever may be the case in Heaven, a terrestrial major league batting average above .300 is nothing to be sneezed at."[69]

There is more substance and less distortion to the claim that the Congress which adopted the Sherman Act was primarily concerned with distributive economic effects rather than with neoclassical "efficiency" concerns. Professor Lande, the principal proponent of this view, claims the debates over the Sherman Act and the F.T.C. and Clayton Acts demonstrate that Congress intended "to subordinate all other concerns to the basic purpose

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[68] Protection of competition as a process, a guarantee of procedural fairness in the private economic sphere similar to the protection of due process in government treatment of the individual in the civil sphere, has been defined by Professor Fox in her examination of the goals of antitrust as follows:

> One overarching idea has unified these three concerns (distrust of power, concern for consumers, and commitment to opportunity for entrepreneurs): *competition as process*. The competition process is the preferred governor of markets. If the impersonal forces of competition, rather than public or private power, determine market behavior and outcomes, power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair. Some measure of productive and allocative efficiency is a byproduct, because competition tends to stimulate lowest-cost production and allocate resources more responsively than a visible public or private hand.

Fox, The Modernization of Antitrust: A New Equilibrium, 66 CORNELL L. REV. 1140, 1154 (1981). For a similar description of "competition" as a process, see Flynn, Rethinking The Sherman Act: Three Proposals for Reducing the Chaos, 49 ANTITRUST L. J. 1593, 1623-27 (1980); Flynn, The Function and Dysfunction of Per Se Rules in Vertical Market Restraints, 58 WASH U. L. Q. 767 (1980).

[69] Cohen, Field Theory and Judicial Logic, 59 YALE L. J. 238, 239 (1950).

of preventing firms with market power from directly harming consumers'';[70] harming consumers in the sense of "preventing 'unfair' transfers of wealth from consumers to firms with market power.''[71] To his credit, Professor Lande pays considerable attention to the extensive expression of concern for political, social and economic goals in addition to the goal of preventing unfair wealth transfers by the Congresses which adopted the antitrust laws. But these other goals of Congress are viewed by Lande as subsidiary to and expressions of the primary goal of preventing undue wealth transfers. Consequently, it is argued, these other goals should be viewed in terms of their relationship to the fairness of wealth transfers, and the wealth transfer goal should be viewed as determinant of the meaning and scope of these other goals in terms of defining the rights and duties established by them.

Revisionism in this instance is once again caused by approaching an analysis of legislative history with a preconceived economic analytical framework in mind and fitting the historical evidence to the requirements of the preconception. Professor

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[70] Lande, Wealth Transfers, *supra* note 9.

[71] *Id.* at 68. Professor Lande elaborated on the meaning of unfair wealth transfer as follows:

> [T]he antitrust laws were passed primarily to further what may be called a distributive goal of preventing unfair acquisitions of consumers' wealth by firms with market power. It should be stressed however, that Congress did not pass the antitrust laws to secure the "fair" overall distribution of wealth in our economy or even to help the poor. Congress merely wanted to prevent one transfer of wealth that it considered inequitable, and to promote the distribution of wealth that competitive markets would bring. In other words Congress implicitly declared that "consumer surplus" was the rightful entitlement of consumers; consumers were given the right to purchase competitively priced goods. Firms with market power were condemned because they acquired this property right without compensation to consumers. This Article contends that the antitrust laws embody a strong preference for consumers over firms with market power.

Id. at 70.

Lande's analysis begins with the unsupported assumption "that Congress passed the antitrust laws to further economic objectives."[72] It is possible that ambiguity concerning the assumption arises because of a deeper question concerning the meaning of "economic objectives." A preoccupation with abstract economic theorizing or an undue concern for certainty in the legal rules to be derived may cause one to believe that an economic theory is capable of producing fixed and quantified rules which are the central matrix around which all other values and disciplines revolve. Consequently, political historical, social, philosophical, psychological and other constructs for viewing reality and defining values in order to construct legal principles become subservient to or subdivisions of the only thing which counts—the "truths" established by economic analysis. Such a form of intellectual imperialism is, of course not unknown—particularly in law and in theology—but appears to be a head-in-the-sand affliction to which disciplines considering themselves to be a "science" in nineteenth century terms are particularly susceptible.[73] It may also be an expression of a belief in the need for

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[72] Lande, Wealth Transfers at 68. Later in his article, Professor Lande recognizes that the Sherman Act was passed by politicians, not economists, and that the leading economists of the day were not consulted. Lande, Wealth Transfers at 89, footnote 98. Such an observation is difficult to reconcile with his view that the goals of the politicians who passed the Sherman Act were predominantly and primarily economic goals they knew little or nothing about.

[73] "Mature science recognizes its models as working hypotheses limited by the assumptions underlying the model and by the unvarnished consequences of applying the model to brute reality. The hypothesis is only a starting point to aid in our understanding of reality. It is always subject to rejection where the assumptions and reality do not equate, and it should never be held up as a 'totem' immutable and free of change. These limitations upon 'scientific' reasoning are widely accepted in the physical sciences, where there may be some justification for believing that there are fixed, ultimate, and universal rules governing the behavior of matter and celestial bodies. In economics, however, we have yet to discover similar rules, if, in fact, they do exist."

Flynn, "Reaganomics" and Antitrust Enforcement: A Jurisprudential Critique, 1983 UTAH L. Rev. 269, 274.

a positivistic approach to the problems antitrust policy is expected to address in order to avoid uncertainty in the rules derived and an implicit rejection of modern views of the nature of legal reasoning.

Thus it is that the Lande twist on the legislative history of the antitrust laws is to translate social and political concerns into subsidiary expressions of the central "economic" concern through which the legislative history is read rather than treat economic, political and social goals as coequal concerns or as a complex of views representing deeper principled moral goals for the law; goals which Congress intended be reconciled by the courts in the factual context of specific disputes. It is a process of fitting the legislative history to a preconceived model for divining legislative intent which is similar to that followed by Judge Bork, except for the choice of a different perspective from which to use the rose colored glasses of the model through which to view the evidence. The Congress which passed the Sherman Act did not have the Lande distributive lens for identifying "monopoly profits" and mandating distribution of profits deemed monopoly profits to consumers through which to focus its multiple normative concerns in defining the goals of antitrust policy. Instead of a single focus of condemning unfair wealth transfers for a variety of ends, ends which must be understood only in terms of their impact on wealth transfers identified by an economic model not then in existence, the Congress which passed the Sherman Act and the other major antitrust laws had a multiplicity of goals in mind—normative principles which it sought to achieve.[74] The

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[74] The search is one for principles in the sense of underlying normative values and goals intended to be protected or promoted and not a search for some set of specific rules intended. The specific rules intended are not ends unto themselves, but expressions of the principles being given protection or being promoted. See, Dworkin, From Bork to Kennedy, N.Y. Rev. Books 36 (Dec. 17, 1987). For example, the repeated mention of a concern for prohibiting unfair wealth transfers, is an indication of a political, social and economic concern with the exercise of property, contract and corporate rights in society in ways creating a maldistribution of wealth. They are also statements which can and should be understood as preserving or fostering principles of conferring on federal courts the responsibility for defining and limiting the scope of

compulsion to simplify that reality, so that one can avoid the deeper complexity of defining the reach and scope of antitrust policy—reduce it to a negotiable instruments law if you like—is inconsistent with the reality with which antitrust policy must deal and with the debates in Congress, as well as the demands of a reflective legal process.

Clearly, Congress expressed outrage over the unfair or undue transfer of great wealth from consumers to the trusts. It was variously described as theft, robbery and the impoverishment of the many for the benefit of the few. What remains elusive is identifying the yardstick by which Congress intended that a particular wealth transfer was to be found "unfair" or "undue" since it is apparent that not all wealth transfers were intended to be condemned. Simply arguing that "wealth transfers" from consumers to producers were to be condemned for the purpose of condemning wealth transfers is as circular as the neoclassical approach premised on a tautological definition of "rationality."[75]

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property and contract rights of corporations; guaranteeing individual success or failure by a competitive process as a basic economic, social and political right; protecting the integrity of the political process for individuals by preventing its political domination by economic power; legitimating the revolution of corporate capitalism so long as it behaved in accordance with a competitive process; avoiding pressures to socialize private economic power because of uncontrolled social and political abuses and; insuring fairness to all individuals in their ability to share in the total wealth of society by insuring that access to wealth and its distribution would be determined by a competitive process in markets free from conspiracies and power displacing that process. The ongoing struggle of defining the balance between individualism and collectivism has been of central concern to the Congresses which have adopted the antitrust laws and the courts which have administered them. See, D. Martin, The Corporation and Antitrust Law Policy: Double Standards, in Corporations and Society: Power and Responsibility 193 (W. Samuels & A. Miller, eds. 1987).

[75] Commenting on the neoclassical concept of the "rational," the late Arthur Leff observed:

> Thus what people do is good and its goodness can be determined by looking at what it is they do. In place of the more arbitrary normative "goods" of Formalism, *and* in place of the more complicated empirical "goods" of Realism, stands the simple definitionally circular "value" of Posner's book. If

Translating expressions identifying a consequence of unbridled corporate growth and greed like unfair wealth transfers into the central normative reason for establishing a federal law prohibiting such consequences, also results in a subtle reorientation of the goals of antitrust policy to conform with a current two-dimensional economic picture of the evils of monopoly; a picture not available to those adopting the policy. The deeper question of whether undue wealth transfers were but a means to and consequence of the frustration of deeper normative ends or the undermining of values Congress intended the law preserve, is not explored. It is assumed at the outset that the ends of the law are "economic" and that the "economics" involved are those assumed by one form of economic modeling to be imposed on what Congress intended, rather than to seek the deeper complex of normative political goals Congress intended to achieve in order to avoid the consequences of a maldistribution of wealth.

The clear political objective behind concern for undue wealth transfers was to prevent the corrupting influence of entrenched wealth upon the political process, the impoverishment of consumers by the unregulated exercise of property and contract rights by those with economic power, and the denial of equality of economic opportunity for the individual by regulating the exercise of property and contract rights of those with economic power. It was believed that one consequence of the breakdown of a competitive process would be the maldistribution of wealth.

> human desire itself becomes normative (in the sense that it cannot be criticized), and if human desire is made definitionally identical with certain human acts, then those human acts are beyond criticism in normative or efficiency terms; everyone is doing as best he can exactly what he set out to do which, by definition, is "good" for him. In those terms, it is not surprising that economic analyses have a considerable power in predicting how people in fact behave.

Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 VA. L. REV. 451, 458 (1974). See also, Harrison, Egoism, Altruism, and Market Illusions: The Limits of Law and Economics, 33 UCLA L. REV. 1309 (1986).

Preventing undue wealth transfers was not an end unto itself; it was a consequence of failing to secure the integrity of the political process from entrenched economic power and of protecting equality of opportunity for the individual by maintaining a balance of economic, political and social power in society. In the words of Judge Hand, the desire of Congress was "to put an end to the great aggregations of capital because of the helplessness of the individual before them."[76]

Professor Lande reverses means and ends by emphasizing statements from the debates condemning "trusts and monopolies *because they had enough market power to raise prices and 'unfairly' extract wealth from consumers, turning it into monopoly profits.*"[77] Congress condemned trusts and monopolies with the effect of transferring wealth *because* they displaced competition as a process and denied equality of economic opportunity to the individual. Nowhere in the debates is there a triangle identifying "monopoly profit" or other modern day talisman for drawing a line between an appropriate and inappropriate transfer of wealth. Lande cites Senator Sherman's discussion of the wealth transfer effects of trusts on the assumption that the statements are premised on a picture of the dead weight loss of monopoly derived by the geometric manipulation of a two-dimensional economic model Senator Sherman never heard of. The actual statement cited, a statement of Senator George quoted by Senator Sherman in their debate over the constitutionality of the bill is as follows:

> These trusts and combinations are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business, and they decrease the cost of raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy and increase the price of what they sell. They aggregate to themselves

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[76] United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945). See also, Martin, *supra* note 74; Million, The Sherman Act and the Balance of Power, as yet unpublished manuscript accepted by the So. CAL. L. REV. (1988).

[77] Lande, Wealth Transfers at 93 (emphasis added).

> great, enormous wealth by extortion which makes the people poor. Then, making this extorted wealth the means of further extortion from their unfortunate victims, the people of the United States, they pursue unmolested, unrestrained by law, their ceaseless round of peculation under the law, till they are fast producing that condition in our people in which the great mass of them are the servitors of those who have this aggregated wealth at their command.[78]

The concern with wealth transfers and the basis for defining specific transfers as "unfair" or "undue" is the effect of making the individual a "servitor" of those who accumulate wealth as a result of the use of power to do so and of law (contract and property rights) to accomplish the task. Three brief clauses are quoted from a speech by Senator Sherman covering two and one-half pages of the Congressional Record.[79] These three clauses demonstrate that Senator Sherman's central concern was for wealth transfers caused by "monopolistic pricing." A review of the speech indicates that Senator Sherman saw as the goals of his bill: supplementing the prohibitions of state common law against restraints of trade by regulating the exercise of contract and property rights with a federal law protecting interstate and foreign commerce against such restraints;[80] assuring equality of competitive opportunity for every individual by controlling the power of the trusts;[81] legitimating the revolution of corporate

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[78] 21 Cong. Rec. 2461 (51st Cong. 1890).

[79] Lande, Wealth Transfers at 93-94, footnote 111.

[80] 21 Cong. Rec. 2457 (51st Cong. 1890): "It is to arm the federal courts with the limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States." See also, note 29, *supra*.

[81] *Id.*: "It [the bill] does not in the least affect combinations in aid of production where there is free and fair competition. It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundation of the equality of all rights and privileges.

. . . .

The sole object of such a combination [trust] is to make competition impossible. It can control the market, raise or lower prices, as will best

capitalism by subjecting those accumulating capital and economic power to a competitive process enforced by law;[82] and preventing the accumulation of undue economic power and wealth in the hands of a few undermining economic and political liberty.[83]

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promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist."

[82] *Id.*: "This bill does not seek to cripple combinations of capital and labor, the formation of partnerships or corporations, but only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer. It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill and not the lawful and useful combination. . . . If their business is lawful they can combine in any way and enjoy the advantages of their united skill and capital provided they do not combine to prevent competition."

[83] *Id.*: "Its [illegal combination] governing motive is to increase the profits of the party composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interests of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and when it embraces the great body of all the corporations engaged in a particular industry in all of the States of the Union, it tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public, and by the rule of both the common and the civil law, is null and void. . . .

. . . . .

If the concentrated powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities. If anything is wrong, this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade with power to prevent competition and to fix the price of any commodity." *See also*, 21 Cong. Rec. at 2458, Senator Sherman quoting and relying on a Michigan Supreme Court decision holding the contract establishing the match trust null and void as "a leading case" and condemning monopolies on political grounds.

Professor Lande recognizes these and other political and social goals behind the Sherman Act, yet nevertheless asserts that Congress' "main concern was with firms acquiring or possessing enough market power to raise prices artificially and to restrict output."[84] He further asserts that Congress' "primary aim" was to enable consumers to purchase products at competitive prices, not for the end of preventing allocative inefficiency, but for the end of preventing the unfair "transforming [of] consumers' wealth into monopoly profits."[85] Transforming the complex of normative goals Congress had in mind when adopting the Sherman Act into a single-minded "concern," "aim," and "end" of preventing unfair wealth transfers is at least superficially plausible—a .300 batting average—when compared to the "efficiency" only interpretation. It is however, a subtle case of revisionism altering the focus of the statute and its interpretation away from the political and social ends Congress intended in order to conform the statute with an abstract economic model identifying "consumer surplus" by contrasting a hypothetical purely competitive market with a hypothetically purely monopolized market. While the Lande revisionism results in a broader slice of reality becoming "fact" relevant to antitrust analysis[86]

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[84] Lande, Wealth Transfers at 88.

[85] Lande, at 105. Lande makes similar claims concerning the F.T.C. Act and the Clayton Act. A detailed analysis of the legislative history of those statutes is beyond the scope of this article. Suffice it to say, these claims are also highly questionable. In this author's opinion, they are also a case of fitting the evidence to a preconceived model; a model not widely known or shared at the time of the adoption of the original statutes. There is evidence of a concern with displacing the competitive process having as one effect a transfer of wealth from consumers to those exercising the restraint singled out for special consideration under the F.T.C. Act and the Clayton Act. It was not however the sole concern, the underlying normative reason for adoption of those statutes or the measure by which a wealth transfer would be deemed due or undue. The Clayton and FTC Acts clearly were not adopted to implement the neoclassical concept of "efficiency." They were adopted for a complex of social, political and economic ends and for deeper normative purposes.

[86] By this is meant that the normative ends which a law is intended to achieve determine which aspects of reality will be deemed "facts" and which not for purposes of the analysis and for purposes of deter-

and the potential for more extensive regulation of economic activity than the bare minimum envisioned by the "efficiency only" rewrite, it still remains revisionism substituting a modern day economic model for the normative goals Congress intended antitrust policy to fulfill.

C. Restoring the policy making balance

> *"As history teaches, efficiency is not the reason for antitrust. . . . Distrust of power is the central and common ground that over time has unified support for antitrust statutes."*[87]

There is a difficult problem of interpretation concerning broad provisions of the Constitution like the Fourteenth Amendment and basic laws like the antitrust laws. For example, should the concept underlying the word "person" in the Fourteenth

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mining what the "facts" mean. In a present day contract dispute, the race of the plaintiff is generally irrelevant—not a "fact" for purposes of the legal dispute and its resolution. One could not say the same in Nazi Germany where a party to the dispute was a Jew or in most of nineteenth century and a good part of twentieth century in America where a party to the dispute was black or a woman.

Deciding what are "facts" for the resolution of an antitrust dispute and establishing the weight and meaning of those facts will vary greatly depending on what one understands as the normative ends of the law. If neoclassical "efficiency" is the sole end of the antitrust law, only that part of reality concerning price and output will be facts. Even then, the fanaticism with which belief in the model is held may distort the recognition and interpretation of the slice of reality permitted to be "fact" beyond all recognition. See, Flynn, An Antitrust Allegory, 38 HASTINGS L. J. 517 (1987). The *Alcoa* case would have been decided for Alcoa in the absence of evidence showing monopoly profits or a reduction in output under Lande's analysis.

If preventing unfair wealth transfers is the objective of the law, only those "facts" defining what is an "unfair wealth transfer" will be the things permitted to be the facts for purposes of the analysis. In *Alcoa* for example, Alcoa's restrained use of its monopoly would apparently have resulted in a finding of no violation of the Sherman Act. See also, Lande, Wealth Transfers at 142-50 illustrating the differences between the efficiency only and the primarily wealth transfer premises for analyzing a horizontal merger.

[87] Fox, The Modernization of Antitrust: A New Equilibrium, 66 Cornell L. Rev. 1140 (1981).

Amendment be restricted to the circumstances causing its adoption in the year 1868; namely, be limited to those "persons" who were slaves and whose plight occasioned passage of the Amendment? Or should a modern day court engage in a search for the normative principles being set forth; namely the moral values underlying the words and concepts being expressed in the Amendment, in light of the contemporary reality being claimed to fall within the meaning of the Amendment? The first approach is one of positivism, or the belief that law can and should be mechanically applied like a theorem of Euclidian geometry to a fixed reality. The second approach embraces a range of jurisprudential possibilities from an analytical realism to that of extreme realism or the Contemporary Legal Studies position that judges can do and justify whatever they wish to do.[88] Clearly, judicial interpretation has fallen into some variation of the second camp since at least the 1930s and is unlikely to revert to some form of rigid positivism in the near term.[89] A search for and understanding of the underlying moral goals of a law in defining its relevance, meaning and application to reality and vice versa is the task of the contemporary jurist seeking to follow "original intent" and one seeking to respect the legislative branch's lawmaking function and the sources of discretion inherent in the process of determining the interaction of rules and reality in the context of a legal dispute.

It is in this sense that one must evaluate the underlying moral goals of antitrust policy and the legislative history of the Sherman Act. The Congress which adopted the Act was dealing with a deeper and more difficult problem than preventing combinations or acts of monopolization impairing the geometric model of neoclassical theorizing defining "efficiency" or controlling the

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[88] See, Flynn, The "Is" and "Ought" of Vertical Restraints After Monsanto Co. v. Spray-Rite Service Corp., 71 CORNELL L. REV. 1095, 1128, n. 183 (1986).

[89] Judge Bork's positivism became an implicit issue in the Senate Hearings which resulted in the rejection of his nomination for the United States Supreme Court. See R. Dworkin, From Bork to Kennedy, The New York Review of Books, December 17, 1987, p. 36; Kurland, *supra* note 16.

consequence of an "unfair" or "undue" wealth transfer identified by the model. Underlying the debates on the Sherman Act and the other major antitrust laws was the attempt to define the meaning and scope of property and contract rights in the face of radical changes in the late nineteenth century in the way in which society defined and permitted through its law the exercise of legal-economic relationships in society. Congress was delegating to the federal courts a common law authority to define and balance those rights where a conflict in the rights claimed raised the issue of whether one or the other side of the dispute was exercising or being denied the right to exercise their property and contract rights pursuant to a competitive process. Rapid industrialization and the uncontrolled use of the corporate form threatened individualism and the ability of the individual to exercise and protect their right to contract and their rights in property.[90] The possession of power through the exercise of contract and property rights was the central concern of the proponents of the Sherman Act, not the enshrinement of an abstract model premised upon preexisting and absolute property and contract rights.[91]

There is no doubt that the ideological shift toward adopting the neoclassical model in the courts and the academy as the beginning and end of antitrust policy has undermined this deeper normative concern of Congress. It has also proved seductive to the courts, enforcement agencies and academics by virtue of offering the "right" answer to complex disputes through the manipulation of a simplistic, closed model. Bork's interpretation of the legislative goals of antitrust policy as incorporating the neoclassical model has been cited approvingly by the Supreme

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[90] It is in this sense that the seizure of "consumer surplus" by a monopolist can be viewed as an "undue" wealth transfer. At bottom, it is undue because it is an interference with and a taking of a federally protected property right belonging to consumers under a regime of contract and property rights governed by a competitive process. See Lande, Wealth Transfers at 70.

[91] See Martin, *supra* note 74.

Court,[92] and the Administration has implemented Bork's patently incorrect interpretation of the legislative history in its selection of cases and in its administrative interpretation of the law in the Merger and Vertical Guidelines. A rigid belief in the eternal verity of the neoclassical model also appears to have been a significant litmus test in the Administration's selection of some prominent academics for nomination to the federal judiciary. The underlying normative assumptions of the model equate with the conservative ideological preferences of the Administration, and the promise of always providing the right answer for a host of troubling questions and the justification for ignoring many others has proved to be seductive to the courts.

The displacement of the original intent of antitrust policy by a superficial economic model premised upon a world which does not exist and absolutist property and contract rights is, however, inconsistent with the legislative history of the statute. That history reveals that the members of the Congress which adopted the Sherman Act viewed what they were doing as a form of private as opposed to public law making. They were defining limits upon the exercise of private contract and property rights in order to insure the integrity of the political process, the rights of individuals in the exercise of their property and contract rights, and the right of competitors to succeed or fail pursuant to a competitive process. Federal courts were being vested with a common law jurisdiction to prevent contracts and combinations restraining trade and commerce or monopolizing trade or commerce which had the effect of impairing the competitive process as the rule of trade.

Such an approach rejects an absolutist transactional justice vision[93] of law asserting preexisting property and contract rights

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[92] *See*, e.g., Aspen Skiing v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[93] By "transactional justice vision" of law is meant the assumption that individuals have inherent rights in property without regard to a legal system and that contract rights exist independent of a legal system. See Gjerdingen, The Politics of the Coase Theorem and Its Relationship to Modern Legal Thought, 35 BUFFALO L. REV. 871, 876 (1986). Both assumptions underlie the politically conservative law and economics

and views property and contract rights as creations of the legal system.[94] The Sherman Act and the other major antitrust laws should be viewed as laws limiting and balancing contract and property rights through a common law analytical process for the normative ends of: (1) insuring the dispersion of economic power to protect legal, social and political processes from undue economic power; (2) promoting freedom and opportunity to compete on the merits; (3) fostering the satisfaction of consumers and protecting their property and contract rights; and (4)

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movement and the assertion of absolutist property right claims like that expressed in R. Epstein, Takings: Private Property and the Power of Eminent Domain (1985). It is also obvious that Congress was recognizing some level of State created and protected property and contract rights when it adopted the antitrust laws. Congress sought to impose antitrust constraints to both regulate and protect those rights, a decision the courts ought to respect.

[94] Both property and contract rights are, of course, creations of society and its legal system as part of the process by which the values of individualism and community are implemented in light of the realities confronting that society and its underlying moral ideals. See, Cohen, Property and Sovereignty, 13 CORNELL L. Q. 8 (1927); Pound, Liberty of Contract, 18 YALE L. J. 454 (1909). "[T]he law of contract may be viewed as a subsidiary branch of public law, as a body of rules according to which the sovereign power of the state will be exercised as between the parties to a more or less voluntary transaction." Cohen, The Basis of Contract, 46 HARV. L. REV. 553, 586 (1933).

Antitrust policy should be viewed as it originally was in the legislative history of the antitrust laws and the *Addyston Pipe & Steel* case as part of the fundamental laws defining the scope of property and contract rights, rather than as a bothersome limitation upon the unfettered right to invoke the community's law to exercise such rights. If this approach were followed, the long term public interest, wealth distribution and bargaining power could not be ignored in the determination of what contract and property rights ought to be because each would have a significant impact in understanding what can take place under the circumstances in accord with the assumptions and values underlying property and contract law. Moreover, preexisting legal choices protecting property or contract rights influence current legal choices and future ones. See, E. Mensch, The History of Mainstream Legal Thought, in The Politics of Law: A Progressive Technique 18, 37 (D. Kaireys, ed. 1982).

protecting the competition process as market governor.[95] They were and are not laws enacting a two-dimensional economic model to be made the major premise of a syllogism for mechanically resolving complex factual disputes by the simplistic application of deductive logic. The concept of competition was and should be understood in the sense in which it was used in the Congressional debates, competition as a process. Professor Eleanor Fox captured the essence of the concept as follows:

> One overarching idea has unified these three concerns (distrust of power, concern for consumers and commitment to opportunity for entrepreneurs): *competition as process*. The competition process is the preferred governor of markets. If the impersonal forces of competition, rather than public or private power, determine market behavior and outcomes, power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair. Some measure of productive and allocative efficiency is a byproduct, because competition tends to stimulate lowest-cost production and allocate resources more responsively than a visible public or private power.[96]

Fidelity to "original intent" as well as common sense in the determination of the meaning of the law when applied to the facts, *and vice versa*, requires that enforcement of antitrust policy be based on this concept of competition. It is the concept of competition which underlay the debates over the Sherman Act and it is the concept of competition which ought to motivate administration of the Act in this era if the social, political and

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Some of the advocates of a "law and economics" approach, view property rights as a form of preexisting natural law right enshrined in the Constitution. See, R. Epstein, *supra* note 93. This view is debated, strenuously, in Symposium on Richard Epstein's Takings: Private Property and the Power of Eminent Domain, 41 U. MIAMI L. REV. 1 (1986). The jurisprudential assumptions underlying Epstein's formalism are noted in Radin, The Consequences of Conceptualism, 41 MIAMI L. REV. 239 (1986) and the political consequences are noted in Sunstein, Two Faces of Liberalism, 41 MIAMI L. REV. 245 (1986). See also, Scanlon, Nozick on Rights, Liberty, and Property, 6 PHIL. & PUB. AFFAIRS 1 (1976).

95 Fox, *supra* note 68, at 1182.

96 Fox, *ibid.*

economic goals Congress intended the Act to fulfill are to be realized.

II. Conclusion

> *"Current antitrust theories destroy democratic values and subvert justice to render the current social order politically legitimate."*[97]

The advent of a new administration entrusted with enforcement of antitrust policy and the nomination of officials and judges charged with implementing the policies Congress had in mind for the law opens an opportunity to restore the original intent of antitrust policy, It can not and should not be an administration which ignores what has gone on before, nor should it be an administration which ignores the insights of economics—at least those insights which are empirically based—and other disciplines which have something to say about the issues antitrust policy was intended to address and the consequences of a particular decision. It should be an administration which takes account of modern evolutions in reality in the process of adjusting deep and longstanding normative commitments made by Congress in the antitrust laws.

It should be an administration which insists upon common sense, rather than ideological fanaticism, in the application of the law, upon skill with common law legal reasoning, and upon an appreciation for reality in its administration of the law. Along with the basic values expressed by the Constitution in the public sphere, the Sherman Act is an expression of basic social and political values to be followed in the private economic sphere. It is a statement for protecting individualism in private economic affairs and a prohibition of the accumulation of undue economic power or the exercise of collective economic power in ways which deny consumers the short- and long-term benefits of a competitive process and which deny the rights of competitors to succeed

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97 Curran, Beyond Economic Concepts and Categories: A Democratic Refiguration of Antitrust Law, 28 St. Louis L. J. 349, 361 (1987).

or fail pursuant to a competitive process. One can only hope that the current preoccupation with neoclassical economic models falsely purporting to implement what is essentially a normative social and political policy, will be seen as yet another transitory phase in the enduring struggle of the common law process to understand the relevance, meaning and application of the law in light of the facts and the relevance, meaning and application of the facts in light of the law. Unravelling this riddle requires constant reflective recourse as to the moral ends of the law established by the elective representatives of the people—fidelity to "original intent" and the exercise of "judicial restraint" to coin some cliches.